

Jan 17, 2017, 4:07 pm

RECEIVED ELECTRONICALLY

Supreme Court No. 93952-7

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 74018-1

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

In re the Parenting and Support of:
DR;

NATHAN BRASFIELD, Appellant,

and

LAUREN RAINBOW, Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

The Honorable Suzanne R. Parisien, Judge

ANSWER TO PETITION FOR REVIEW

Laura A. Carlsen, WSBA No. 41000
Attorney for Respondent
MCKINLEY IRVIN, PLLC
1200 Pacific Ave., Suite 2000
Phone: 253.952.4290
Fax: 206.223.1999

TABLE OF CONTENTS

Table of Authorities ii

Statement of the Case 1

Argument 10

 A. Review should be denied as the trial court’s decisions
 are in line with the public interests; Mr. Brasfield’s
 interpretation of statutes is contrary to public
 interest..... 11

 B. Even under Mr. Brasfield’s interpretation of the domestic
 violence statutes, the DVPO was appropriate.....14

 C. Entry of the five-year DVPO was appropriate and does not
 restrain Mr. Brasfield’s contact with the child..... 16

 D. Mr. Brasfield’s claim that actual damage must occur before
 courts can issue .191 restrictions is unsupported by
 applicable law.....17

Conclusion 19

TABLE OF AUTHORITIES

Washington Cases

Blair v. Wash. St. Univ., 108 Wn.2d 558, 740 P.2d 1379 (1987).....19

Council House v. Hawk, 136 Wn. App. 153, 147 P.3d 1305 (2006).....19

Frank Collucio Const. v. King County, 136 Wn. App. 751 (2007).....19

Marriage of Burrill, 113 Wn. App. 863, 56 P.3d 993 (2002).....17

Marriage of Chandola, 180 Wn.2d 632, 327 P.3d 644 (2014).....18

Marriage of Katare, 175 Wn.2d 23, 283 P.3d 546 (2012).....18

Washington Statutes

RCW 4.84.185.....19

RCW 9A.46.110.....11

RCW 26.09.140.....19

RCW 26.09.19113-14, 17-18

RCW 26.50.010.....7, 11-12

RCW 26.50.060.....16

Court rules

RAP 18.1.....19

I. STATEMENT OF THE CASE

This case concerns the best interests of a five-year old boy, DR – a critical point that is absent from Mr. Brasfield’s Petition for Review. The facts, which are set forth below, speak for themselves and demonstrate that the Parenting Plan entered by the Superior Court is in DR’s best interests and should be affirmed.

Ms. Rainbow testified that DR was conceived after she was with Mr. Brasfield for four months. RP 38. Shortly thereafter, Ms. Rainbow learned that Mr. Brasfield had an extensive criminal history, RP 38, including multiple felonies, RP 174, TRIAL EXHIBIT 1. When DR was about one year old, Mr. Brasfield was arrested in their home for possession of stolen property. RP 38. As a result, Ms. Rainbow and DR came home from a trip to see police removing property from their home for three days, during which time they were not allowed to go into the home, use the car, get any child care materials, or tell anyone what was going on. RP 38-39. Ms. Rainbow left Mr. Brasfield shortly thereafter. RP 39.

However, after she left, it became increasingly difficult to interact with Mr. Brasfield as he became “more aggressive in terms of more phone calls and threats. . . . [H]e became extremely mean and seemingly disdainful. He was always high conflict after their separation.” RP 39, GAL REPORT 6. When Ms. Rainbow pursued a Parenting Plan in court, as part of which child support was addressed, Mr. Brasfield started openly

threatening Ms. Rainbow about the things he would do if she did not drop her request for child support. RP 40-41. “Nate told me, quote, drop the child support or see what’s coming to you. I responded, are you threatening me? Nate responded, you figure that out, B-I-T-C-H. I said, Nate, you are not allowed to threaten me, I’m going to call the police. And I don’t remember exactly his – his exact words. But something along the lines of, go ahead and do it.” RP 44-45. Ms. Rainbow did call the police, who spoke with Mr. Brasfield and told him to stay away from Ms. Rainbow and leave her alone. RP 45.

The next morning, Ms. Rainbow woke up to find that her car had been stolen from her driveway. RP 45. Ms. Rainbow learned that just after Mr. Brasfield made his threat to her that night, he “sent somebody to [her] house in the middle of the night, came onto [her] property, stole [her] vehicle that [her] name was on the title of.” RP 46. As a result, Ms. Rainbow had no way to get herself or DR around – not to school, not to work, not to daycare. RP 46-47.

Ms. Rainbow indicated that this was not the first time he had been violent or threatening to her, as he once threw their TV off of their deck into a vacant lot, he punched a hole in a wall in their home out of anger, he almost hit a neighbor with his car as part of an argument, and he almost caused several accidents while Ms. Rainbow was in the car with him - pregnant - when his road rage caused him to drive erratically and

aggressively. RP 48. She described his severe anger, which caused him to act erratically and unpredictably. RP 48.

Also admitted as evidence of Mr. Brasfield's animosity toward Ms. Rainbow was the fact that Ms. Rainbow cooperated with the FBI investigation into Mr. Brasfield's activities, which eventually led to his current incarceration. RP 53. In fact, she helped the FBI gather the last pieces of evidence they needed in order to secure a search warrant. RP 55. Shortly after his arrest, he told his own mother that he had "thought many times about hurting Lauren [Ms. Rainbow], but that he had to make the decision whether or not Danny would be better off with a mom or a dad." RP 57. TRIAL EXHIBIT 12. Specifically, he said "I can't parent Danny. I have way too much anger built up towards his mom, and I don't see it ever going away. . . . **If you decide to talk to Lauren, please tell her that I will not harm her. Tell her that I've thought about it many times, and every time I think about it, I have to decide if Danny's better off having a mom or a dad.**" TRIAL EXHIBIT 12 (emphasis added). It should be noted that he gave his mother instructions to pass this message along to Ms. Rainbow *after* the Domestic Violence Protection Order was entered against him. TRIAL EXHIBIT 12.

Ms. Rainbow was extremely concerned about this statement, as she took its plain language to mean that Mr. Brasfield had contemplated killing her. RP 57. That the fact he had to decide whether Danny would be without a mom or a dad indicated that his decision to hurt Ms. Rainbow

would potentially leave Danny without her. RP 57. Ms. Rainbow further testified that even though Mr. Brasfield was incarcerated at the time, she was still scared of him due to his history of sending people to her house to remove property. RP 57. She feared that he would send someone there to hurt her, or even come after her himself when he is released from prison. RP 57. She talked about how he used coercion and control to get to her – by not dropping child support, he took away her mobility by having her car stolen, and by helping the FBI put him in prison, he stated he thought about hurting her to the point where DR would not have a mom. RP 58.

Ms. Rainbow also described two incidents where she called CPS due to Mr. Brasfield's behavior. RP 59. The first time was when he took DR, who was then one year old, to a construction site and locked him in a room with some toys, food, and a bottle. RP 59. Not only was this concerning as a parent, but as a social worker, Ms. Rainbow was a mandatory reporter who was required to contact CPS. RP 59. She called CPS a second time after DR drank from a glass of rubbing alcohol that was sitting on a coffee table while with Mr. Brasfield, who did not then take him to the doctor or emergency services. RP 60. She later learned as part of Mr. Brasfield's deposition that he had taken DR (who was four at the time) to someone's house to "trim" marijuana. RP 96. Although Mr. Brasfield stated that "someone's mom" was supposed to be watching Danny, Mr. Brasfield would not identify the person and took the Fifth

when asked. RP 96. Ms. Rainbow testified that DR vomited and was very sick as a result of that day. RP 96.

At this point, Ms. Rainbow became even more scared of Mr. Brasfield learning that she had filed the reports against him. RP 61. She was scared that he would retaliate against her. RP 61. In fact, after she did call CPS, he posted on Facebook about how “the bitch I had a kid with . . . is accusing me of false allegations again” and continued in a hostile, aggressive manner to say that she was lucky getting her car stolen was all she got as a result of pursuing child support. RP 75-76. TRIAL EXHIBIT 2, 3. Not only were the contents of these messages concerning and threatening, but the fact that Mr. Brasfield openly shared them on such a public forum was even more concerning. RP 76.

For a time after the parties’ separation, Mr. Brasfield lived with his parents. RP 78. In December of 2013, he moved into his own residence without notifying Ms. Rainbow. After she did find out, he refused to tell her the new address, claiming she was making false allegations of child abuse against him. RP 79. Shortly after his move, on January 4, 2014, DR mentioned there were guns at Mr. Brasfield’s house. RP 78, 82. The previous day, Mr. Brasfield’s father had dropped DR off without any shoes or underwear, stating that Mr. Brasfield had left DR with them. RP 80. Mr. Brasfield had denied there were any guns there, but months later he was arrested there and guns were found in the house. RP 79.

As DR aged and entered school, he started exhibiting severe behavioral problems at school after spending time with Mr. Brasfield. RP 62. These problems impacted his view of and performance at school, something that could impact him later in life. RP 66. After DR started spending less time with Mr. Brasfield, his behavior improved. RP 62. At the time Mr. Brasfield was incarcerated, he had only been seeing DR about six days a month. RP 63.

Regarding Mr. Brasfield's incarceration, on April 22, 2014, he was charged in federal court for being a felon in possession of a firearm. TRIAL EXHIBIT 9. This was in large part due to Ms. Rainbow's assistance to the FBI. On April 14, 2014, the FBI Agent who was investigating Mr. Brasfield was alerted that Ms. Rainbow had contacted the police because she learned Mr. Brasfield had a large illegal marijuana grow operation in his basement, and that her son had seen several guns inside the residence as well. TRIAL EXHIBIT 11. She was asked to help with their investigation, but she declined for them to interview DR. TRIAL EXHIBIT 11. On April 22, 2014, the FBI executed a search warrant for Mr. Brasfield's home and found three firearms in the hallway closet on the second floor of his house. TRIAL EXHIBIT 11. They located gun parts in other rooms in the home as well as a United States Postal Service Box in the living room with multiple boxes of ammunition inside. TRIAL EXHIBIT 11. Agents also found another man in the home who was hiding from an arrest warrant, about which Mr. Brasfield knew,

and who was keeping a Springfield .40 caliber pistol in the closet of his bedroom. TRIAL EXHIBIT 11.

COURT PROCEEDINGS

Shortly after his arrest, Ms. Rainbow petitioned for a domestic violence protection order and to modify their parenting plan. FOF 2. On June 3, 2014, Mr. Brasfield agreed to and signed a Domestic Violence Protection Order against him. FOF 3. Specifically, the order he signed includes the following findings: **“Respondent committed domestic violence as defined in RCW 26.50.010 and represents a credible threat to the physical safety of petitioner; the court concludes as a matter of law the relief below shall be granted.” DVPO 1.**

DOMESTIC VIOLENCE

Ms. Rainbow testified that “the collective of all of Nate’s words, actions and general demeanor towards me certainly has me fearful of Nate. Nate has made decisions that have – when Nate took my car, it wasn’t just taking my car. There was – there’s a big difference between him stealing my car after making a threat to me versus him just taking some random car. That was premeditated. He threatened me, he carried out that threat. He took something that was of value to me that limited my mobility and my freedom, that put me in a very vulnerable position.” RP 137.

“Nathan’s behavior showed a propensity, and a capability, and a potential for violent behavior. When I was in a relationship with the person who is capable of throwing a flat screen TV 10 [feet] off of a porch into a lot, that

sends a bit of a message of maybe we shouldn't make this person too mad." RP 140.

The GAL also described some additional aspects of Mr. Brasfield's past that were cause for concern. For example, he noted that:

[T]he venomous hatred that Nate has for Lauren, coupled with his history of intimidating her and his youngest sister, along with his proclivity for weapons, his willingness to get someone to take the vehicle from her . . . and his sense of entitlement to create his own justice taken collectively make it entirely reasonable that she would be fearful. . . . [H]is threats can be considered control tactics and he has acted on them, for example when he had the car taken from Lauren.

GAL REPORT 24.

DANNY'S BEST INTERESTS

Mr. Brasfield's criminal issues aside, extensive testimony was presented at trial that restricting Mr. Brasfield's contact with DR was in DR's best interests. DR's therapist, Jenna Genzale, had been seeing DR for some time to assess his mental health due to concerns about his anxiety levels. RP 18. Despite DR's young age, she diagnosed him with General Anxiety Disorder, noting that he "does present with several symptoms of anxiety, and worry, fear, difficulty concentrating, and staying focused." RP 18, 21. Ms. Genzale expressed specific concern DR's anxiety about his father and his ability to understand what is going on with Mr. Brasfield. RP 20. She further indicated that DR was suffering from tremendous confusion about his father's incarceration as well as bad

feelings about what it means about his father. RP 21. This is compounded by his anxiety, which has already caused him to exhibit defiant behavior and act out in school and at home. RP 22. Ms. Genzale recommended against DR having contact with his father, not only as it would particularly exacerbate DR's anxiety, but also because even phone calls between DR and his father had been strained and contained conflict. RP 66-68. Ms. Genzale was particularly concerned that further negative interaction between DR and Mr. Brasfield could cause DR's anxiety to deepen, be traumatic for him, and develop into post-traumatic stress. RP 24. She concluded that any benefits DR would gain from contact with his father would likely be outweighed by the damage it would do to DR. RP 25.

The trial court also heard from Candace Mangum, the principal at a school DR attended for two years. RP 108. She described DR's behavior at school and how he would "just get very agitated and upset." RP 111. She and other school staff noticed that DR was more agitated when Mr. Brasfield dropped him off at school, and it was those times when the school had a "hard time calming him down." RP 112. There were even instances where DR was agitated and hurt kids or talked about guns or how his dad showed him a gun that caught the school staff's attention. RP 114. They also noticed that on days when Mr. Brasfield was set to pick DR up from school, DR became increasingly agitated toward the end of the day. RP 115. He got angry, threw things, ran around, and would have to sit in the office to calm down. RP 115-16. The principal also described

the number of times Mr. Brasfield dropped DR off at school without lunch or in soiled clothes DR had worn the day before (requiring the school to change him into school clothing). RP 117.

GAL REPORT

David Hodges was appointed as Guardian ad Litem in this matter. RP 182, 185. In addition to the incidents that have already been described, the GAL learned that there were two additional CPS reports filed against Mr. Brasfield – one by Danny’s school on May 13, 2013, after Danny told his school that “his dad locks him in the bathroom and hits him.” GAL REPORT 3. The second CPS report was filed by an FBI agent after they raided Mr. Brasfield’s home and found chemicals, marijuana plants, and firearms that were all unsecured and accessible to DR at visits.

II. ARGUMENT

This case is about the best interests of a child, DR, the primary focus of any child custody case, and interestingly enough, Mr. Brasfield’s Petition for Review focuses on what he wants, what he believes are his rights, or what he feels entitled to, but does not discuss DR’s best interests. In fact, his briefing resembles his own comments about his rights to possess a firearm (despite the laws saying he cannot due to being a felon): “Okay the right of the people to keep and bear arms shall not be infringed, shall not. It means, it can’t be done I still have the legal right to possess and bear firearms, guaranteed to me by the Constitution no matter what the fucking government says about it” TRIAL EXHIBIT 11.

The facts as deemed credible by the trial court as well as Mr. Brasfield's arguments make it clear that his focus is on what is best for him – not what is best for DR, and the failure to recognize this is exactly why the Parenting Plan and DVPO should be affirmed.

A. REVIEW SHOULD BE DENIED AS THE TRIAL COURT'S DECISIONS ARE IN LINE WITH THE PUBLIC INTERESTS; MR. BRASFIELD'S INTERPRETATION OF STATUTES IS CONTRARY TO PUBLIC INTEREST

Taken as a whole, Mr. Brasfield's argument to this Court is that the basis for Domestic Violence Protection Orders should be drastically curtailed. However, these limits for which Mr. Brasfield advocates directly contradict the express purpose of the Domestic Violence Prevent Act, which is to make it easier for victims to come forward and obtain protection. His interpretation also ignores the fact that Domestic Violence is not simply about direct physical harm, but the cycle of abuse that goes along with it, including the control, manipulation, and intimidation referenced in the statute. Domestic violence is defined by RCW 26.50.010(3) as:

(a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault . . . (b) sexual assault . . . or (c) stalking as defined in RCW 9A.46.110.

Stalking is further defined by RCW 9A.46.110 as “intentionally and repeatedly harasses . . . [and] the person being harassed . . . is placed in fear that the stalker intends to injure the person, another person, or property of the person The feeling of fear must be one that a

reasonable person in the same situation would experience under all the circumstances; and . . . the stalker either . . . intends to frighten, intimidate, or harass the person; or . . . knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.” These actual statutory definitions do not support Mr. Brasfield’s requested curtailment of the law.

Mr. Brasfield states that the threat of harm must be “imminent” but that the Court of Appeals’ interpretation nullified this word. His point seems to be that even though he threatened Ms. Rainbow’s life, the fact that he has not actually taken her life should mean that his threat was not “imminent.” When Mr. Brasfield threatened Ms. Rainbow to drop child support, he sent someone to her house that night to steal her car. It is reasonable then, that when she learns of a threat to her life even when Mr. Brasfield is incarcerated, she would have an imminent fear that he would send someone out to harm her again. That he did not include in his threat the exact time and date (which would be an unreasonable expectation) only makes the fear more real and persistent.

Mr. Brasfield also argues that the “threat” must be “specific” to the harm. The definition of domestic violence per RCW 26.50.010(3) does not include this limitation, however, and it is easy to imagine why. If an abuser threatens to punch the victim in the face but then actually kicks the victim in the back, it makes threats even more terrifying for the victim

who was not only threatened and kicked, but who now does not know what other surprises are coming. That the statute includes not only the actual physical harm, but the “fear” itself of physical harm means that the Legislature intended for fear alone to be a basis for the protection order. There is no requirement – or loophole, so to speak – that an abuser can inflict fear by threatening one type of harm but avoid a protection order by actually inflicting a different type of harm. In fact, there is no requirement in the statute that the means of inflicting fear ever be carried out. Mr. Brasfield threatened Ms. Rainbow’s life; there is not and should not be a requirement that he actually carry through with that threat before she can receive protection (especially when he has carried out threats before).

Mr. Brasfield further states that there must be more than one act before a court can impose restrictions/issue an order. Regarding the issuance of the DVPO, no such limitation is included in the statute, as the words used are singular, not plural. Whether the abuser threatens the victim with assault daily for a month or only hits the victim one time, it is all part of domestic violence. Under Mr. Brasfield’s interpretation, the victim would need to be hit more than once before a court would have power to issue an order. Mr. Brasfield points to the language used under RCW 26.09.191, conflating the issuance of a restriction in a parenting plan with the issuance of a protection order, to say that there must be multiple acts of domestic violence before an order or a restriction can be issued. No such language exists in RCW 26.50. Nevertheless, with respect to

RCW 26.09.191 and the word “acts,” there are multiple acts as set forth above. Both orders were appropriate.

Ultimately, it appears Mr. Brasfield is trying to read ambiguity into the DVPO statutes as a way to undo the DVPO and Parenting Plan entered against him, but this ignores that there is an actual basis for both of these orders to be entered.

B. EVEN UNDER MR. BRASFIELD’S INTERPRETATION OF THE DOMESTIC VIOLENCE STATUTES, THE DVPO WAS APPROPRIATE

In the instant case, the protection order entered against Mr. Brasfield is absolutely necessary and important for the safety of both Ms. Rainbow and Danny. First, Mr. Brasfield has inflicted in Ms. Rainbow the fear of imminent physical harm, bodily injury, or assault. Her testimony as outlined above and in the record demonstrates how he threatened her, both directly over the telephone, and indirectly to the public. He followed through with that threat by having a stranger go to her home in the middle of the night to steal her car. Having someone take it in the middle of the night sends a different message, and is much more concerning than a simple property dispute. It is intimidating and terrifying to think that at any moment, he could send someone else to her property to carry out another threat.

Further, Mr. Brasfield admitted that he had considered physically harming Ms. Rainbow, and the fact that he made that consideration known to Ms. Rainbow is further intimidation. This is a critical distinction, as

Mr. Brasfield argues in his Petition that he simply made “non-threatening, private speech” that “cannot be domestic violence against a non-privy party” As noted above, the threat against Ms. Rainbow’s life A) was directly threatening, as it forced him to consider whether or not to leave DR without a mother or a father; B) was made privy to Ms. Rainbow, as part of the email to his mother was a request that he pass that message along to Ms. Rainbow; and C) Ms. Rainbow did receive that message. Not only was this threatening, it was also a violation of the protection order in existence at the time.

Further, as Ms. Rainbow testified, Mr. Brasfield had carried out his threats before. She testified as to his violence, which was widespread and included road rage incidents toward other drivers, fights with friends, attempting to hit a neighbor with a car, and the destruction of property. The court also heard extensive information about Mr. Brasfield’s long criminal record, which includes his current incarceration for violating a court order and the law against felons possessing weapons. In sum, he threatened her, demonstrated to her that he would carry through on his threats, made it clear that he contemplated harming her physically, and demonstrated to her that he has a lot of anger and problems managing that anger. On top of this is his propensity for associating with other felons, the fact that she assisted the FBI in his arrest which forms the basis of this action (and his current incarceration), and his admitted, unabashed anger and hatred toward Ms. Rainbow that, by his own words, will never

diminish. These form the basis for the finding that Mr. Brasfield committed domestic violence against Ms. Rainbow, and more importantly, that a domestic violence protection order is critical for Ms. Rainbow's safety.

Further, Mr. Brasfield ignores the fact that he signed an agreed Domestic Violence Restraining Order. While he claims it was because he was facing a criminal case, the order itself makes no such contingencies. Instead, the order contains an explicit finding – an admission by Mr. Brasfield – that domestic violence occurred and there is a basis for the order. His position is that he had no choice due to his criminal case, but that does not prevent him from either requesting a continuance of the DV hearing until his criminal case is resolved or otherwise arguing about other allegations in the petition. He did not exercise those options, and instead he reaped whatever benefit he saw from signing an agreed order. He should be judicially estopped from now saying that order has no meaning.

C. ENTRY OF THE FIVE-YEAR DVPO WAS APPROPRIATE AND DOES NOT RESTRAIN MR. BRASFIELD'S CONTACT WITH THE CHILD

Mr. Brasfield also argues that the five-year protection order violates RCW 26.50.060(2), which states that “[i]f a protection order restrains the respondent from contacting the respondent's minor children the restrain shall be for a fixed period not to exceed one year.” This rule does not apply, however, since the protection order in effect does not prohibit Mr. Brasfield from contacting Danny. Further, the statute itself

exempts protection orders issued under RCW chapters 26.09, 26.10, or 26.26, which makes it inapplicable in this case. Lastly, the length of the order is important here, as Mr. Brasfield will be incarcerated for longer than a year, and it may indeed take quite some time before his anger with her for assisting the FBI might dwindle. While Mr. Brasfield's brief makes the point that protecting Ms. Rainbow has nothing to do with protecting Danny, Ms. Rainbow is Danny's primary parent and his main source of stability; protecting Ms. Rainbow from harm has very much to do with protecting Danny and serving his best interests. Mr. Brasfield acknowledged as much when he threatened Ms. Rainbow's life when he stated he had to consider whether it would be better for DR to live without a mother or a father.

D. MR. BRASFIELD'S CLAIM THAT ACTUAL DAMAGE MUST OCCUR BEFORE COURTS CAN ISSUE .191 RESTRICTIONS IS UNSUPPORTED BY APPLICABLE LAW

Mr. Brasfield makes many claims about what is required before a court can make a finding under RCW 26.09.191, but fails to acknowledge prevailing law that makes it clear the trial court is not required to wait for actual damage to occur before making a finding or imposing a restriction per RCW 26.09.191. "[T]he trial court need not wait for actual harm to accrue before imposing restrictions on visitation. *In re Marriage of Burrill*, 113 Wn. App. 863, 872, 56 P.3d 993 (2002) ("evidence of actual damage is not required"). Instead, it is sufficient just for the danger of damage to exist. *Id.* "[D]eciding whether to impose restrictions based on

a threat of future harm necessarily involves consideration of the parties' past actions." *In re Marriage of Katare*, 175 Wn.2d 23, 39-40, 283 P.3d 546 (2012). RCW 26.09.191 requires the court to consider whether a parent's involvement or conduct "may" have an adverse effect on the children's best interests. "To make this determination, the court must engage in a form of risk assessment." *Id.* The focus is not on "hardships which predictably result from a [separation of parents]," *id.*, but rather on imposing restrictions that are similar in severity to the nature of the potential harm, *In re Marriage of Chandola*, 180 Wn.2d 632, 327 P.3d 644 (2014). "A trial court abuses its discretion if it imposes a restriction that is not reasonably calculated to prevent such a harm." *Id.* at 648.

In this case, as described above, there are serious concerns about Mr. Brasfield's parenting even regardless of his current incarceration. The home life he created for Danny was not in Danny's best interests and actually did cause Danny harm in many ways (from vomiting after drinking rubbing alcohol to living in a home with heroin users and a grow operation and guns to simply being so angry and violent that Danny acts out in school after being with his dad). The findings made by the court do reflect the evidence at hand as described above, and restricting/limiting Mr. Brasfield's time absolutely has a nexus to the concerns about Danny's welfare. Mr. Brasfield has demonstrated that he cannot make good parenting decisions about Danny and will be dishonest about Danny's care


with him. His visitation should be supervised and limited until he can demonstrate that he has turned his life around.

III. CONCLUSION

For the foregoing reasons, Ms. Rainbow respectfully requests that this Court affirm the trial court's decision and award her attorney fees for the necessity of responding to these appeals. RAP 18.1 allows a party to recover attorney fees in responding to an appeal. RCW 26.09.140 and RCW 4.84.185 allow for recovery on a frivolous matter that is advanced without reasonable cause. In this case, Mr. Brasfield has persisted in driving forward litigation without evidence or legal arguments to support his claims and without facing any financial responsibility for the claims since others are paying his fees. To the extent that Ms. Rainbow's appeal has been handled *pro bono*, it is possible to request fees as a reimbursement of time nevertheless pursuant to prevailing case law that allows fees regardless of whether the representation is *pro bono* or not. *See, e.g., Frank Collucio Const. Co. v. King County*, 136 Wn. App. 751, 780, 150 P.3d 1147 (2007); *Blair v. Wash. St. Univ.*, 108 Wn.2d 558, 570-71, 740 P.2d 1379 (1987); *Council House v. Hawk*, 136 Wn. App. 153, 160, 147 P.3d 1305 (2006) (“[U]nless a statute expressly prohibits fee awards to pro bono attorneys, the fact that representation is pro bono is never justification for denial of fees.”) (citing *Blair v. Wash. St. Univ.*, 108 Wn.2d at 571 (“trial court abused its discretion in even considering plaintiffs’ public interest representation”).

SIGNED AND DATED this 17th day of January, 2016.

McKINLEY IRVIN, PLLC



Laura A. Carlsen, WSBA No. 41000